Nos. 406 & 421

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

RED BALL MOTOR FREIGHT, INC., ET AL., *Appellants*

v.

EMMA SHANNON and RICHARD J. SHANNON, d/b/a E. and R. SHANNON, *Appellees*

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, ET AL., *Appellants*

v.

EMMA SHANNON and RICHARD J. SHANNON, d/b/a E. and R. SHANNON, *Appellees*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION

BRIEF FOR THE APPELLEES

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STATUTES INVOLVED

Statutes other than those referred to by the various appellants in their briefs which appellees believe have some materiality in this cause are set forth in the Appendix. These include Section 222 (a) of the Interstate Commerce Act, 49 U.S.C. Section

322 (a), *infra*, page 59, and Section 8 (b) of the Administrative Procedure Act, 60 Stat. 242 (5 U.S.C. Section 1007b), *infra*, page 59.

QUESTION PRESENTED

Whether from the record as a whole the District Court was correct in holding that the findings and conclusions by the Interstate Commerce Commission that appellees are engaging in transportation in interstate commerce of sugar as a common or contract carrier by motor vehicle without appropriate authority in violation of Sections 206 (a) or 209 (a) of the Interstate Commerce Act was not supported by substantial evidence.

STATEMENT

So as to distinguish between the various appellants herein, the United States of America and Interstate Commerce Commission will hereinafter be referred to as appellant, the various appellant carriers will be referred to as appellant carrier, the amicus curiae as such, and the appellees in the singular as appellee.

Appellee believes that the various statements of the case contained in the other briefs herein do not adequately present the true fact situation surrounding appellee's dealings in sugar; therefore appellee hereby sets out other facts contained in the record in this cause which are material to a correct solution to the problem before the Court. For purposes of clarity, appellee will restate certain of the facts already described in the various appellant's briefs.

In the first place the original hearing in this matter was ordered and developed as a result of a routine investigation and that about two years prior

to the original hearing in this matter appellee had received a communication from the Interstate Commerce Commission concerning his sugar business but no action was at that time taken against him. (R. 66, 71) Appellee is in the business of buying and selling livestock, in the feed mill business, and also sells corn, oats, wheat, bran, molasses, sugar, salt, fertilizers and everything in the feed line. Appellee has been in business since about 1934 and began handling grains, fertilizers, molasses and similar items about six years prior to the 1957 hearing before the examiner in this matter and sugar a little over three years prior to said hearing. (R. 74, 106, 107) Appellee had seven trucks valued at $14,176.50 as of December 31, 1956, and of those, only three of them were used for long hauling which includes the hauling of sugar and many other items. That the total amount of fixed assets of the company, including mill equipment, office furniture, automobiles, etc. is $59,350.26 as of December 31, 1956, and all of said asset accounts remained fairly constant during the year 1956 and up until the date of hearing. (R. 85, 87, 88, 90, 97) That in addition to the fixed asset accounts there were $56,459.91 in current assets of which $30,000.00 was in accounts receivable, leaving $26,000.00 other assets, including approximately $4,700.00 in cash, so that the three trucks being used to haul sugar represented in the total of seven trucks, the seven trucks being valued at $14,176.50, was a small percentage of the total assets of the company; and further such trucks used for hauling sugar also hauled many other items. (R. 88, 89, 97, 98) The salaries paid truck drivers used on the large trucks averaged $240.00 per week out of a total payroll of $1100.00 per week and the three truck

drivers on the three large trucks were not paid exclusively for hauling sugar but hauled many other items. (R. 90, 91, 97, 98)

Appellee purchases sugar taking title in his own name and any losses on same after purchase is borne by appellee. (R. 71, 105, 108) When the word "consignee" is used on appellant's exhibit I (R. 118), appellant's own witness admits that such designation is used in error (R. 71, 72). It is not appellee's practice to take orders for sugar and then obtain same. (R. 110) Appellee attempts to sell the sugar as rapidly as possible because the market for sugar breaks rapidly, the margin of profit is comparatively small, and the commodity deteriorates quickly. (R. 72, 73, 104) The margin of profit in the sugar business for a sugar dealer in San Antonio, Texas, on the date of the hearing in March, 1957, was 25¢ to 35¢ per hundred pounds. (R. 103) Appellee could and had sent an empty truck from San Antonio to the place of purchase of the sugar at Supreme, Louisiana, to transport sugar back to San Antonio at a profit. (R. 112) Appellee stated that he could not make a profit on such transportation at the prices sugar was selling for in San Antonio at the time of the hearing since beet sugar from Colorado, California, and Canada was, at such time, keeping the sales price of sugar down in San Antonio. (R. 108)

The cost of unloading sugar and storing it is comparatively high and eats into or causes to vanish any profit that those in the sugar business might make, and the price fluctuation in the sugar business are also quite drastic, which necessitates the moving of

the item quickly to avoid possible loss. That although this would be true in any mercantile business some items are more perishable than others. (R. 68, 73) On occasion appellee will send an empty truck to Louisiana to load sugar, but as a matter of common sense it would be more profitable for him to be delivering some commodity that he was selling to Louisiana at the same time. (R. 67, 111) However, a considerable amount of sugar remains in the warehouse of appellee in San Antonio (over 50,000 pounds at the last inventory taken prior to the hearing, less that portion thereof which may have been in transit but still properly included in the inventory.) (R. 81, 93, 112) From this stored sugar frequent sales in less than carload lots are made. (R. 109, 110) Appellee has on occasion stored sugar in commercial warehouses when his warehouse facilities were inadequate, but such additional expense, of course, is avoided when appellee's warehouse facilities can handle the storage. (R. 77, 82)

There was no evidence to show that there were any identifiable transportation charges made by appellee to the purchasers of the sugar; nor has appellee any basis or formula for assessing transportation charges, but instead his sales are governed solely by the market price of sugar in San Antonio; nor does appellee hold himself out to the general public to haul sugar for any compensation. (R. 14, 15)

That prior to appellee's buying and selling of sugar he purchased and still does purchase salt and grain in the same manner as he now purchases and sells

sugar; however, the Interstate Commerce Commission never questioned the transportation of any of the items handled in the identical manner as sugar. (R. 23, 113)

Appellee sells almost all of his sugar to purchasers on credit and has been selling on credit since the inception of his sugar business. On the date of the hearing appellee had more than $10,000.00 tied up in accounts receivable from purchasers of sugar and at times during 1956 (the year immediately prior to the hearing) had as much as $20,000.00 to $30,000.00 tied up in accounts receivable from sugar purchasers. (R. 82, 83, 84, 85) Of course, what is considered a large inventory varies depending on the business and a large inventory in the sugar business would be considerably less than would an inventory of more stable products, where the market does not fluctuate, nor the item deteriorate as rapidly. (R. 68, 73, 104)

SUMMARY OF ARGUMENT

The basic question is whether the district court was correct in holding that appellee was a bona fide merchant in his handling of sugar.

First appellee discusses the fact that the district court applied the correct standard under the substantial evidence rule to determine the validity of the opinion of the Interstate Commerce Commission. The examiner's report which recommended in favor of appellee is next discussed together with authorities to the effect that such report has some affirmative worth in this matter.

The "primary business" test prior to 1958 is considered with a showing that under the case law a fact situation such as the case at bar, where appellee has the incidents of private carriage as a sugar merchant, should be held to be such private carriage. It is then pointed out that the Congressional Amendment of 1958 merely codified the case law until that time, so that said amendment should not change the result of private carriage in this case. The facts of the case are then discussed with a view toward distinguishing those cases holding for-hire carriage. A conclusion is reached from the record as a whole which includes such factors as appellee buying the sugar, assuming both physical and credit risks for same, having no transportation charges billed to his purchasers, having a small percentage of his assets tied up in transportation facilities, and having a reasonable inventory of sugar, to name a few, that appellee is a private carrier.

The decision of the district court is discussed to point out that such court properly considered the primary business test in reaching its decision. A technical defense is then considered since appellee has never been charged with the violation of the section of the Interstate Commerce Act (Section 203c) upon which appellants seek a reversal in this case, nor was the investigation producing the record in this case ordered to investigate a violation of such section.

Finally appellee argues that as a matter of policy, private carriage deserves as much protection as any other type and that the Congress so intended.

ARGUMENT

The Court Below Correctly Applied the Standard to Determine if the Interstate Commerce Commission's Findings are Supported by Substantial Evidence

The courts have set out the standard for determining whether or not an order of the Interstate Commerce Commission should be permanently enjoined, annulled and set aside. Different courts use different language to determine this test; however, possibly, all the tests are the same or at least are similar to the extent that the difference is only in the language used. In *Scott Truck Line, Inc.* v. *United States of America and Interstate Commerce Commission*, 163 F. Supp. 118, (D. Colo., 1958) the court stated that it would not examine the facts further than to determine whether there was substantial evidence to sustain the order. In *ABC Freight Forwarding Corp.* v. *United States of America and Interstate Commerce Commission*, 125 F. Supp. 926, (S. D. New York, 1954) the court said that the issue for the court to decide is whether the action of the Commission was arbitrary or capricious. In *Arrowhead Freight Lines, Ltd.* v. *United States, et. al.*, 114 F. Supp. 804 (S. D. Calif., 1953) the court stated that there must be sufficient evidence in the record to enable the court to determine that there is some rational basis for the Commission's administrative conclusions.

The Examiner's Report Should be Considered in Applying the Substantial Evidence Rule

The Interstate Commerce Commission in their opinion in the case at bar found that the statement of facts in the examiner's report was adequate in all

material respects and, as modified in said opinion, said Interstate Commerce Commission adopted said examiner's report as their own (R. 20).

The transcript contains a verbatim copy of the examiner's report and recommended order. (R. 10-15) It should be noted that the examiner in the case at bar, after having heard all the witnesses, found all the facts and the law in favor of appellee and recommended that the investigation as to appellee be dismissed. Whenever there is an examiner involved, and the examiner finds against the individual party (and in favor of the governmental agency) and later the substantial evidence rule comes into play, regardless of the state of the record, there is always the specter lurking behind the whole case that the examiner did not believe the testimony of all of the individual's witnesses and that, therefore, the individual had no evidence to support his contentions. This would mean that through presumptions, taken together with the substantial evidence rule, the governmental agency would have sustained its burden before the courts. In the case at bar, however, the above is completely inapplicable, because the examiner has ruled straight down the line in favor of appellee; consequently, the examiner, after having heard, in person, all of the witnesses, was satisfied that the evidence given by the witnesses for appellee was true and that from the facts the matter should have been dismissed.

The cases go further, however, in upholding the validity of the examiner's report, and do not limit the worth of the examiner's report to merely preventing it from being said that all of the material evidence elicited

from the individual's witnesses was not believed. Instead the cases give the examiner's report some affirmative worth in a case such as the case at bar, in that it requires a more severe study of the record in order to uphold the governmental agency's order under the substantial evidence rule.

To proceed to an analysis of the cases, the attention of the Court is directed to the Administrative Procedure Act, Section 1 et. seq., 5 U.S.C.A. Section 1001 et. seq., the pertinent section thereof being found in the Appendix of this brief at page 59. The Act discusses the review by the courts of orders by a governmental agency. *Coyle Lines, Inc.* v. *United States*, 115 F. Supp. 272 (D. La., 1953) holds that the above quoted sections of the Administrative Procedure Act is applicable to Interstate Commerce Commission proceedings. It is unquestioned from a reading of the Act that proceedings before the Interstate Commerce Commission would clearly come under the terms and conditions set up in the Act.

Proceeding further an important case in the "substantial evidence" field is *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474 (1951). The Supreme Court first states that the standard of proof required of the National Labor Relations Board by the Taft-Hartley Act is the same as that to be exacted by courts reviewing every administrative action subject to the Administrative Procedure Act. (Since the Interstate Commerce Commission proceedings would come under the Administrative Procedure

Act this case would be full authority for the case at bar). The Court then continues as follows:

> "Whether or not it was ever permissible for courts to determine substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitely precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement in both statutes that courts consider the whole record.
>
> " * * * Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting the decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view.
>
> " * * * The Board's findings are entitled to respect, but they must nonetheless be set aside when the record before the Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of the witnesses or its informed judgment on matters within its special competence or both."

The Court continued by stating in effect that the Court of Appeals in determining substantiality of evidence to support the National Labor Relations Board order was not barred from taking into account the report of the Board's examiner on questions of fact in-

sofar as the examiner's report was rejected by the Board, but rather all of the examiner's findings were to be considered along with the consistency and inherent probability of testimony. The Court then considered Administrative Procedure Act Section 8 (b), 5 U.S.C.A. Section 1007 (b) which states: "All decisions (including initial, recommended or tentative decisions) shall become a part of the record * * *"

At page 467 of the opinion the Court continues by stating from the Attorney General's Committee on Administrative Procedure:

> " 'In general, the relationship upon appeal between the hearing commissioner and the agency ought to a considerable extent to be that of trial court to appellate court. Conclusions, interpretations, law and policy should, of course, be open to full review. On the other hand, on matters which the hearing commissioner, having heard the evidence and seen the witnesses, is best qualified to decide, the agency should be reluctant to disturb his findings unless error is clearly shown.' "

The Court continues at page 469:

> "We intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion. We therefore remand the case to the Court of Appeals. On reconsideration of the record it should accord the findings of the trial examiner the relevance that they reasonably command in answering the comprehensive question whether the evidence supporting the Board's order is substantial * * *"

A good case discussing the substantial evidence rule is that of *United States ex. rel. Lindenau* v. *Watkins*, 73 F. Supp. 216 (S. D. New York, 1947). Reference is here made to such opinion which discusses in great detail the substantial evidence rule and its legislative history and basis. There the court states that in a review of administrative action "substantial evidence" is evidence of such quality and weight as would be sufficient to justify a reasonable man in drawing the inference of fact which is sought to be sustained, and it implies a quality of proof which induces conviction and which makes a definite impression on reason. The Court continues by stating that it is no longer sufficient that the findings be supported by some evidence and that there must be more than a scintilla of evidence and more than suspicion or surmise, and that it must be more satisfying than hearsay or rumor. In other words, the Court seems to state that in the substantial evidence test, the word "substantial" is placed there for a purpose.

A Discussion of the Primary Business Test Prior to the Congressional Amendment of 1958

In its opinion found in the record in the case at bar (R. 17-31) the Interstate Commerce Commission finds that under the "primary business" doctrine, the transportation of sugar by appellee is not in furtherance of his primary business and that, therefore, appellee is not a private carrier of sugar, but, instead, is either a contract or common carrier. An examination of the cases on the "primary business" test should be in order at this time. The leading case in this field is *Brooks Transportation Co., Inc. et. al.* v. *United States, et. al.*, 93 F. Supp. 517. (E. D. Va., 1950), affirmed,

340 U. S. 925. In the *Brooks* case the Brooks Transportation Co. brought a suit against the United States and the Interstate Commerce Commission to enjoin, vacate and set aside orders of the Commission holding that a furniture manufacturer which delivered some of its furniture to customers in its own trucks and that its parent corporation which delivered liquors in its own trucks to customers were private carriers.

In the case the court held that if it is established that the primary business of a concern is the manufacture or sale of goods which the concern transports itself in the furtherance of its primary business, and the transportation is merely incidental thereto, the carriage of such goods from the factory or other place of business to the customer is private carriage, even though a charge for transportation is included in the selling price or added as a separate item. Although the delivery of the items in the *Brooks* case was somewhat different from the case at bar, in that the company's trucks in the *Brooks* case delivered the items from the place of business to the customers; the case is still similar to the case at bar, since when the trucks returned to the factory they brought back materials needed at the factory. In the case at bar the Interstate Commerce Commission is complaining about the bringing of sugar back from Supreme, Louisiana, by appellee when the truck may have been used to deliver other items such as grain, cattle, etc. in that general area (which other items have never been questioned by the Commission). It should also be pointed out that in the *Brooks* case there was a definite transportation charge made, which charge has never been made by appellee, and still the *Brooks* case held the carriage to be private.

The court in the *Brooks* case states:

> "The Commission in deciding that Lenoir and Schenley were private carriers as opposed to contract or common carriers applied what is known as the primary business test. In other words, if it is established that the primary business of a concern is the manufacture or sale of goods which the owner transports in furtherance of that business and the transportation is merely incident thereto, the carriage of such goods from the factory or other place of business to the customer is private carriage even though a charge for transportation is included in the selling price or is added as a separate item."

As previously pointed out the case at bar is a situation where the question of transportation is the return of merchandise rather than the sale of merchandise from the manufacturer, but the principle appears to be the same, and evidently the Interstate Commerce Commission believed that the primary business test should be applicable herein because they use same as part of the basis for their decision and quoted the *Brooks* case in their opinion in the case at bar.

In its application of the *Brooks* case to the case at bar the Interstate Commerce Commission seems to ignore the fact that appellee is in a general mercantile business and that all of the items sold by appellee, with the exception of sugar, have been expressly approved by the Interstate Commerce Commission as part of the business of appellee, (R. 23), this being so even though appellee has stated that prior to his being engaged in the sugar business he brought back other items in his

trucks in his business in the Louisiana area, which was done in the identical manner as is now done in the sugar phase of his operation, (R. 113), but which has been held to be entirely permissible and legal. In its application of the "primary business" test the Commission seems to read into the test more than is therein contained. They appear to take each item sold by appellee separately and to decide that the "primary business" test must be applied to that separate item. Appellee submits that the test does not so limit itself. Instead it is necessary to scrutinize the operations of appellee as a whole, and that as a whole and from the complete record appellee is in a general mercantile business dealing with various types of items including sugar. That applying the test in this manner, it is obvious that the transportation of sugar from Supreme, Louisiana, to San Antonio, Texas, by appellee is certainly in furtherance of a primary business enterprise, which is the general mercantile business of appellee. From the evidence it is also clear that the transportation of sugar by appellee is in furtherance of the sugar phase of the business which is a primary business enterprise. This is pointed out by the fact that appellee purchases the goods in his own name, has no preexisting orders for same, has only a reasonably small percentage of his assets tied up in transportation facilities and only part of his transportation facilities are used for the transportation of sugar. Also he is selling the sugar at the going market price in San Antonio and obtaining the going profit therefor, is maintaining a reasonable inventory of sugar on hand (up to 50,000 pounds), is responsible for any loss or damage to the sugar, and is selling sugar on credit and having substantial accounts receivable tied up in sugar (as much as $20,000 or

$30,000). Appellee submits, however, that by applying the "primary business" test to the general mercantile business as a whole that *a fortiori* he is a legitimate sugar merchant.

The *Brooks* case discusses various reasons why a concern might want to deliver in its own trucks rather than use a common carrier, such as the absence of congestion at loading docks, the safe arrival of goods not mixed with those belonging to others, the control over the time of delivery, etc.

Some interesting cases in this field will now be discussed. These cases were referred to by appellant, appellant carrier, and amicus curiae but appellee would like to give his views concerning such cases. The first is *Interstate Commerce Commission* v. *Clayton*, 127 F. 2d 967, (C. A. 10, 1942). In that case Clayton resided in Ucon, Idaho, and maintained a small coal yard at his home where he kept about a truck load of coal on hand. He purchased the coal in Utah and paid for the coal with his own funds and sold both for cash and credit. He solicited orders before transporting the coal and after he had transported the coal. He did not purchase the coal to fill any particular order and many of the orders were taken by his wife while he was going to buy the coal. He sold from his truck and if any coal remained he stored it at his home. From time to time he filled orders for coal from that stored in his home yard. (Certainly the facts in that case are not as strong for private carriage as in the case at bar). The court specifically mentioned that Clayton had not indulged in any subterfuge or design to avoid the requirements of the Interstate Commerce Commission Act (there is

no showing whatever of any subterfuge or design in the case at bar). The court found the carriage to be private.

The next case is *Interstate Commerce Commission* v. *Tank Oil Corporation*, 151 F. 2d 834. (C. A. 5, 1945) In that case the appellee owned twelve filling stations and controlled four others. During the period of time in question he transported about 168 tank cars of gasoline to his own stations and about 165 tank cars of gasoline to the stations controlled, and to customers generally. No charge for freight or transportation as such were quoted or made (the same is true in the case at bar). The appellee had no storage tanks of its own (appellee in the case at bar does keep inventories of sugar). The appellee was engaged in transportation to the extent that it enabled it to keep its trucks in full operation and to realize a profit on the sale of the gasoline. The court pointed out, however, that the appellee bought the gas itself, ran the risk in case of loss of cargo and the failure of customers to pay. The court considered the *Clayton* case above discussed and the case of *Interstate Commerce Commission* v. *Stickle*, 128 F. 2d 155, (C. A. 10, 1942), certiorari denied, 317 U. S. 650 which will be hereinafter discussed, and in holding the carriage to be private stated:

> "Congress not only intended to say, but said, that if a person, in good faith, transports his own property for the purpose of sale or in the furtherance of his own commercial enterprise, he is a private carrier".

The language of the court would certainly apply to the facts in the case at bar and require appellee to be held to be a private carrier.

In *McBroom Contract Carrier Application*, 1 M.C.C. 425 (1937), it was merely held that the ownership of the goods alone is not conclusive to establish private carriage. There was a situation of a backhaul where the goods were sold for approximately the cost to the applicant plus the cost of transportation. It was found that further inquiry was necessary to develop the complete fact situation.

In *Lyle H. Carpenter*, 2 M.C.C. 85, (1937), it was found that the hauling of coal was only in full truckloads with no inventories kept, the transportation was performed for anyone upon request and to fill preexisting orders. The mere fact that the coal was purchased with the transporters own funds was insufficient to show private carriage. This was contrasted with the *Congoleum-Narin, Inc.* case, 2 M.C.C. 237 (1937), where it was found that where the applicant owned and operated its own trucks and transported its own manufactured goods between its manufacturing plants and from its manufacturing plants to wholesalers and retailers, and also transported its raw materials from terminals of line-haul carriers to its manufacturing plants that its carriage was private. It should be remembered that the *Brooks* case, *supra*, talks not only of the primary business of a concern being the manufacture of goods but also permits the primary business of a concern to be the sale of goods, which is appellee's situation.

In *L. A. Woiteshek; Common Carrier Application*, 42 M.C.C. 193 (1943), the Interstate Commerce Commission found that each case must be determined upon its own particular facts and neither the receipt of com-

pensation for transportation identifiable as such nor the existing of some noncarrier business to which the transportation may be incidental is *alone* conclusive. The examiner in the case at bar quoted from the *Woiteshek* case as part of the basis for his recommended order that the proceedings against appellee should be discontinued (R. 14) In the case at bar the examiner found from the evidence that appellee had been in business for almost twenty-three years and never engaged in any important truck operations. That it has a storage facility in San Antonio to maintain inventories of sugar, have only a small portion of the assets of the company tied up in transportation facilities, and have no identifiable transportation charges made to the purchasers of the sugar. That appellee has no basis or formula to determine transportation charges but instead the sales are governed by the market price of sugar in San Antonio. That appellee does not hold himself out to the general public to haul sugar for compensation, but that he is engaged in a bona fide business of buying and selling many items including sugar and that under the "primary business" doctrine described in the *Woiteshek* case, appellee is a private carrier. As the Interstate Commerce Commission stated in *Lenoir Chair Co.*, 48 M.C.C. 259 (1948), affirmed 51 M.C.C. 65 (1949), which in the courts became the *Brooks* case, *supra*,:

> "We do not mean that a private carrier may not under the law realize an incidental profit in the conduct of its motor carriage without forsaking or endangering its private carrier status * * * Each case must be determined on its own facts."

The Interstate Commerce Commission in the *Woiteshek* case refers to the *Clayton* case, *supra* and to the *Stickle*

case, *supra*,[1] and notes that both cases were then recent cases and further that they were decided one day apart with two of the three judges on each court being the same on both cases. In the *Clayton* case previously discussed the court found the carriage to be private.[2] In the *Stickle* case which will be discussed later,[3] almost the same court found the carriage to be other than private. The Interstate Commerce Commission in the *Woiteshek* case states that reading the two cases together it is clear that the court based its conclusion in each case on the primary business of the operator. The Commission then held that in the *Woiteshek* case the facts establish that the applicant was engaged in a bona fide non-carrier business and that the transportation which he performs in connection with his direct sales, which are sales which are almost all on prior order and involve transportation of materials from the sources of supply to the place of use, was private carriage. The Commission stated that his so-called direct sales are performed solely as an incident of and in furtherance of his non-carrier business without any purpose to profit from the transportation as such. The facts showed that the so-called direct sales comprised approximately forty per cent of the gross revenue of all

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[1] *Interstate Commerce Commission* v. *Clayton*, 127 F. 2d 967 (C. A. 10, 1942); *A. W. Stickle & Co.* v. *Interstate Commerce Commission*, 128 F. 2d 155 (C. A. 10, 1942), certiorari denied, 317 U. S. 650.

[2] A discussion of the *Clayton* case is found on page 17 of this brief.

[3] A discussion of the *Stickle* case is found on page 34 of this brief. It is thought that the fact that the Courts in the *Stickle* and *Clayton* cases are composed of virtually the same judges is important in considering the cases. Since it points out how the same judges determine the factors important in considering the difference between private and non-private carriage, and how they arrive at different results when the fact situations are altered.

the company sales and where the selling price was computed by adding to the anticipated cost a dealer profit plus a sum sufficient to cover the cost of transportation. The Commission stated in its opinion in the *Woiteshek* case that certain facts were particularly significant in the case — among them being that applicant had been in business for twelve years during most of which period he conducted no important motor carrier operations; also his transportation charge, when transportation is furnished, is based on his actual cost experience without any profit added.

Carrying the Commission's reasoning over to the case at bar, appellee could become a private carrier with the blessing of the Commission if he would not deliver cattle or other goods on his movements to Louisiana, but would merely send an empty truck over to Louisiana to return with sugar and would then add to his cost of the sugar plus his desired profit, his actual transportation cost to obtain such sugar. Is appellee any less a private carrier if he delivers other commodities on the way to Louisiana and then purchases sugar at the going price and returns it to San Antonio where he sells it at the going market price?

As to the various cases cited by appellant carrier concerning the fact that said appellant carrier believes that the court below exceeded the permissible limits of judicial review as laid down in numerous court decisions, suffice it to say that there is not involved in this case a question of the credibility of witnesses and the weight of evidence insofar as the facts are concerned. Nor is this a case where the trial court improperly substituted its own judgment for the administrative

judgment. Instead the facts in the case are virtually undisputed and the question involves one of law as to whether there is substantial evidence in the record to support the judgment of the Interstate Commerce Commission. Certainly a court is authorized to substitute its own judgment for that of the Commission as to a question of law concerning whether the "primary business" doctrine is to be extended to a fact situation such as in the case at bar. As stated in his motion to dismiss appeal or to affirm in this case, appellee does not quarrel with the fact that the Interstate Commerce Commission has done an excellent job in the transportation field. Sometimes, however, such an agency with the best of intentions, may attempt to regulate certain individuals in a manner that they believe is for the public good, but as a result some innocent person or concern is caught in the shuffle and a legitimate and bona fide business is consequently interferred with. Appellee submits that in such a situation it is for the courts to scrutinize the situation and protect the injured party, which is exactly what the trial court did in the case at bar.

The case of *Interstate Commerce Commission* v. *Asphalt Supply Company*, 152 F. Supp. 559, (N.D. Tex., 1957) was a situation where the transportation was as a result of pre-existing orders and the asphalt supply company took the place of a contract carrier at the identical rate of transportation charge. Also the major portion of Asphalt's investment was in transportation facilities.

In *Vincze* v. *Interstate Commerce Commission*, 267 F. 2d 577, (C. A. 9, 1959) the court found sufficient evidence in the record that the defendants, act-

ing in concert, were a single operating company. This was a case of a plan or scheme to evade the Motor Carrier Act which appellee will discuss later. Also the *Vincze* case was decided after 1958 and those later cases will be discussed in a separate group.

The case of *Lamb* v. *Interstate Commerce Commission*, 259 F. 2d 358, (C.A. 10, 1958) is a case where there was subterfuge in a leasing arrangement, which the facts showed was not truly a leasing arrangement in substance. Actually there have been several cases cited involving leased trucks, but since that problem is not directly involved in the case at bar, appellee will not discuss those cases.

The Congressional Amendment of 1958 Merely Codified the Previously Existing Case Law Even Though the Arguments of the Various Appellants Read More into such Amendment

Since the question of Congressional intent is an important factor in this case, it would be well at this point to discuss the amendment of Section 203 (c) of the Interstate Commerce Commission Act in August of 1958, by the addition of the following language:

> Nor shall any person engaged in any other business enterprise transport property by motor vehicle in interstate or foreign commerce for business purposes unless such transportation is within the scope, and in furtherance, of a primary business enterprise (other than transportation) of such person. Section 203 (c) of the Interstate Commerce Act, 49 U.S.C. §303 (c).

The complete section has not been quoted herein since it may be found in the record as part of the Interstate

Commerce Commission's opinion (R. 25) as well as in appellant's brief at page 36. This amendment was made after the examiner's report was filed on August 29, 1957, and before the opinion of the Interstate Commerce Commission on August 3, 1959.

As stated in the opinion of the Interstate Commerce Commission:

> "Amendment of this section had the effect, among other things, of writing into the act our usual or 'primary business' test by which we determine whether questioned transportation activities of those also engaged in business enterprises other than transportation are within the scope of lawful private carriage or of motor-carrier operations for compensation for which authority from this Commission is required. (R. 25)"

Appellee agrees with the language of the Commission above quoted, at least that the amendment merely incorporated the "primary business" test into the statute rather than having same merely applied by case law. The only quarrel that appellee might have would be that the amendment wrote into the statute the "primary business" test as applied by the courts as opposed to the test as applied by the Commission.

Be that as it may, it appears that even though the Commission states that the amendment merely codified the existing law, that in the opinion in the case at bar, they stretched the "primary business" test all out of proportion and, impliedly, or otherwise, by their opinion, hold that the amendment has changed the law and placed a more severe burden on an individual to

show that transportation is private carriage. On page 344 of their opinion (R. 26) the Commission states:

> "The Shannons are engaged in buying and selling livestock and certain related items including, according to their contention, sugar. Similarily we are concerned here with how their sugar dealings differ, if at all, from their dealings in the other commodities, and how their sugar transportation activities which are admittedly in furtherance of their primary business".

Giving the Commission the benefit of the doubt evidently the Commission intended to say as follows:

> "Similarily we are concerned here with how their sugar dealings differ, if at all, from their dealings in the other commodities and how their sugar transportation activities differ, if at all, from their transportation activities which are admittedly in furtherance of their primary business".

Since the evidence is clear that they handle their sugar in the same manner as they have handled other items and continue to handle other items, and further that the Commission has approved the other items as part of the primary business of appellee, (R. 23) it is difficult to see how sugar transportation can be considered different from any of the other items; and since the sugar dealings do not differ from transportation of other items, it is difficult to determine how the Commission under the "primary business" test could hold appellee's actions not to be private carriage.

Evidently the Commission even though stating that the amendment of the act only codified the existing law, really believes that the amendment changed the

law; otherwise it could not have held that appellee's activities were not private carriage. Reference is made to Appendix B found on page 350 of the Commission's opinion, same being a portion of the House Report which was taken from the Committee studying the amendment to the Interstate Commerce Commission Act. H. Rep. 1922, 85th Cong. 2d Sess. (R. 34-37) Part of the report is as follows (R. 35):

> "In addition, business which use their own trucks to deliver their own merchandise, are purchasing goods at or near the final point of delivery of their own merchandise and transporting such goods to places near their own establishments for sale to others. Such transportation is usually performed solely for the purpose of receiving compensation for the otherwise empty return of their trucks. Sometimes the purchase and sale is a bona fide merchandising venture. In other instances, prearranged plans are set up in order that the real consignee may receive transportation at a reduced cost."

Appellant carrier makes the same quotation on page 30 of their brief but fail to italicize the last sentence which appellee submits is at least as important as the rest of the quotation.

It is obvious that the Committee by its recommended amendment of the act was intending to prevent subterfuge in this field and the prevention of prearranged plans to stop the real consignee from receiving transportation at a reduced cost. It is obvious that the Committee did not intend to recommend the passage of an amendment which would change a bona fide

merchandising venture, such as in the case at bar, into something other than private carriage. Nor did the amendment create a situation where "for hire" carriage is automatic whenever there is a backhaul, the hauler uses his trucks exclusively to haul the product, and does not change the form of the product by some further process. Yet the Commission reached this result and appellant and appellant carrier argue for this result even though the record is full of many factors showing private carriage; since according to their interpretation of the "primary business" test, these other factors should be ignored. This could not be the interpretation the Congress intended when the Act was amended in 1958. The amicus curiae does not urge the same interpretation as the various appellants, but only wants it made clear that the "primary business" test is applicable to the case at bar without taking a position, as to what final conclusion should be reached as to the application of such test to the present fact situation.

The Committee hearings from the Senate on Page 348 of the Commissions' Report S. Rep. No. 1647, 85th Cong. 2d Sess. (R. 31-34) and from the House above referred to, make it clear that it was not the intent of such Committees in their recommendation to Congress to change the "primary business" test set out in the *Brooks* case, *supra*. As stated in the House Report, that there was no intention on the part of the Committee in any way to jeopardize or interfere with bona fide private carriage as recognized in the *Brooks* case. It was even suggested to the Committee that the definition of "private carrier" be changed. Actually, as stated in the Committee's Report it was the Interstate

Commerce Commission that proposed this amendment by adding a proviso to the definition of private carrier in the Act, that any person who purchases, transports and sells property for the purpose of fostering a highway transportation business is engaging in a public transportation service. The Committee refused to go along with the amended definition and stated that they had no intention of unsettling the "primary business" test, which would then require another long series of litigation, which finally culminated in the *Brooks* decision. It would appear that in its opinion in the case at bar the Commission proceeded as if the Act had been amended as requested by the Commission, although it is a question that, even if the act had been amended as requested by the Commission, that appellee's actions would be considered not to be private carriage.

Certainly the Congress did not intend for individuals such as are involved in the case at bar to be unable to buy and sell products, including sugar, when they are and have been for many years in the general mercantile business, which is the "primary" business, with sugar being one of several of their commodities bought and sold. There is no evidence whatsoever in the case at bar of "prearranged plans" set up in order that the real consignee may receive transportation at a reduced cost. Appellee believes that the Congress made its intent clear when it refused to change the definition of "private carrier" but instead reiterated the fact that it wanted to codify the "primary business" test in the *Brooks* case. Appellee submits that the examiner was eminently correct in finding that under the "primary business" doctrine appellee's transportation constituted private carriage. Certainly appellee is legitimately in

the sugar business and the hauling thereof is private carriage, and there is no substantial evidence in the record to show otherwise.

Reference is made to Appendix A of the Senate Report at page 349 of the Commission's opinion, where the sub-committee recommends S. Rep. No. 1647, 85th Cong. 2d Sess. (R. 33, 34):

> "What is needed, in the opinion of the sub-committee, is a further prohibition to the effect that no person in any commercial enterprise other than a duly authorized or specifically exempt for-hire transportation business shall transport property by motor vehicle in interstate or foreign commerce unless such transportation is *solely* (italics ours) within the scope and in furtherance of a primary business enterprise (other than transportation) of such person."

By reading the actual amendment (R. 25), it is obvious that the word "solely" was omitted, so that the Congress did not follow the sub-committee's recommendation and limit the primary business test by the use of the word "solely". This would certainly show that the Congress intended for there to be some leeway in the determination of "primary business". It is also worth noting that in the amendment "a" primary business enterprise is used instead of "the" primary business enterprise, which again seems to imply that there should be more leeway given in the determination of what is a "primary business" enterprise and that an indiyidual could have more than one "primary business" enterprise.

Of course, it is not what the Interstate Commerce Commission recommended, nor for that matter what the various Congressional committees recommended that is important in this matter, but instead it is what the Congress actually enacted into law that is material. It is clearly evident that the "primary business" test was placed in the statute as it had previously existed in the case law. This meant that there was no greater burden placed on an individual to show that transportation was private carriage after the amendment of the Act than before. Appellee believes, however, that even though appellant did not receive from the Congress the type of legislation necessary to transform an operation such as appellee conducts into something other than private carriage, that appellant is working under the assumption that it did so receive such Congressional license and as a result has found appellee's operations to be for-hire carriage. Appellee believes that such a finding is not proper under the facts of the case at bar taken together with the "primary business" doctrine as it presently exists in the statutory and case law.

A Discussion of the Authorities Since the Congressional Amendment of 1958

Those cases decided since the adoption of the Congressional amendment of 1958 all seem to present a different factual situation from the case at bar. This is true even for those cases decided by the Interstate Commerce Commission. Even in the case of *Fraering Brokerage Co., Inc.—Investigation of Operations*, Docket No. MC-C-1994, (1959), decided at the same time and with the same opinion as the case at bar, (R. 17-31), one difference is that Fraering never took title to the sugar in question. The producer of the sugar was

paid by the consignee f.o.b. sugar producer's refinery, and any transportation charge for carriage performed by Fraering belonged to Fraering although it was sometimes collected by Fraering and sometimes collected by the refinery for Fraering. Fraering brokered certain grocery items but most of its profit came from its wholesaling operations.

In *Subler Transfer, Inc.—Investigation of Permits*, 79 M.C.C. 561, (1959) Subler paid the refineries upon payment by the purchasers from it. The brokers considered the ultimate purchasers as their customers and there was in evidence a letter between Subler and the brokers showing that the brokers considered that Subler had provided nothing but transportation service. Subler also operated under an Interstate Commerce Commission certificate and permits in other of its operations. The same drivers handled the driving concerning the sugar that drove in Subler's motor carrier operations. Also the bulk of Subler's sugar shipments were to fill prior orders. The Commission distinguished the case of *Taylor* v. *Interstate Commerce Commission*, 209 F. 2d 353, (C.A. 9, 1953) certiorari denied, 347 U.S. 952 (1954). Appellee will discuss the *Taylor* case later in this brief.

Virgil P. Strutzman, 81 M.C.C. 223 (1959), is a case where Strutzman advertised as a truckline. He had a storage facility which was a garage, but all he had in it beside an auto was a small inventory of salt, but the salt inventoried was not the type ordinarily transported by him. The evidence showed that the appearance of the garage showed that it was little, if ever, used for warehousing. The price of the salt was fixed

to yield Strutzman a return of twenty-five cents per mile plus a ten dollar charge for unloading. Strutzman was usually paid on delivery and the major portion of his capital investment consisted of motor vehicles.

In *Mumby Investigation of Operations*, 82 M.C.C. 237 (1960), there were instances where the refinery had billed Mumby's customers directly. In a number of transactions Mumby had added a separate freight charge to the f.o.b. refinery price of the sugar so as arrive at the total amount to be paid by the customer. As to his dealings in flour, all of the flour handled with but one exception had been for the account of Koerner, who on occasion called the mill direct to purchase same who in turn told Mumby. The markup of the flour varied with the distance traversed but remained constant between particular points.

In the case of *Church Point Wholesale Beverage Co.* v. *United States*, 200 F. Supp. 508, (W.D. La., 1961), the District Court of three judges found prohibited transportation; however, in that case most of the goods purchased were purchased with pre-existing orders, no inventories were kept, and the marketing area was hundreds of miles beyond the plaintiffs' selling of their other products. The significance of the fact that the United States Court of Appeals Judge on the court in the *Church Point* case was the same judge that sat on the case at bar (Judge John R. Brown) will be discussed later.

The Facts of the Case at Bar Indicate Private Carriage

Appellee submits that the introduction into evidence of the railroad and trucking freight rates from

Supreme, Louisiana, to San Antonio, Texas, are irrelevant to any issue in this matter. The freight rates were relevant in a case strongly relied upon by appellant in the court below and before the Commission. That case is *A. W. Stickle & Co.* v. *Interstate Commerce Commission, supra.*[4] However, there are so many differences between the *Stickle* case and the case at bar that it will be hard to list them all.

In the *Stickle* case the rates were relevant because they showed that the profit Stickle & Co. obtained for their sale of lumber was the same as the freight rate, so that, in effect, all that Stickle & Co. was doing was obtaining money for freight under the guise of being in the lumber business. However, if, as in the case at bar, the freight rate is considerably different from the average profit obtained by a sugar merchant, then the freight rate itself has no application whatsoever to a determination of whether or not such sugar merchant is actually in the trucking business. Of course, the 15 isolated sales introduced into evidence as Exhibit No. I are not conclusive of the operations of appellee and clearly apply to only a limited period of time, and the record so reflects; but, assuming for purposes of argument, that they are conclusive, they are obviously transactions selected by the Bureau of Inquiry and Compliance to prove their point — that there is in the case at bar, common or contract carriage as opposed to private carriage. However, their own figures show that the average profit obtained is not the freight rate, but far from it. Instead it is simply the reasonable

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[4] 128 F. 2d 155 (C. A. 10, 1942), certiorari denied, 317 U. S. 650. previously referred to on pages 20 and 21 of this brief.

profit of a sugar merchant in the locality where appellee operates. Obviously, appellee does not raise sugar, so naturally the cost of hauling sugar is an important factor to determine his margin of profit, since he buys and sells sugar; but storage costs, bookkeeping costs, bad debts, inventory losses, and loading costs, etc. are also important factors, and just because hauling is an element of cost does not, by any stretch of the imagination, mean that he is in the trucking business for hire.

Regardless of what one calls it, whether or not appellee is in the trucking business would invariably boil down to the question of — are his operations really subterfuge? For it would appear that in view of all the evidence in this matter, that the only way appellee's operations could be held to be anything other than private carriage, would be to find that his sugar operations are really a subterfuge; and there is absolutely no evidence in the record to show any of appellee's sugar operations are anything but legitimate and bona fide. The examiner's findings would certainly appear to be conclusive as to this. It would thus appear that unless all the evidence in the hearing is disbelieved, appellee is definitely and clearly a legitimate sugar merchant. How else could he be in the business of buying and selling sugar when he does not raise it? He buys sugar from the manufacturer, hauls it to his place of business, taking title in his own name, and bearing all the losses connected therewith; sells the sugar on credit with the attendant possibility of bad debt loss and, in the interim period, stores the sugar. What more could he do to be considered a legitimate sugar merchant? Is it necessary for him to haul by rail and pay such costs

when he has his own trucks available for hauling and has had them available over the years for his complete operation, starting with livestock, and expanding over the years to feed stuffs, grain, corn, molasses, salt and sugar.

Nor should it be said that what appellee is actually arguing is that since he made no attempt to hide his operations in sugar that he cannot be held to have engaged in any form of subterfuge. This is not what appellee is contending at all. His contention is, however, that when the Congressional Committees speak about "bona fide merchandising venture" as opposed to "pre-arranged plans being set up in order that the real consignee may receive transportation at a reduced cost"; that more is meant than simply backhauling is not private carriage unless the backhauler additionally uses other types of carriage for the same materials other than his own trucks or unless he does something to the product to change its form. Instead the entire record should be considered to determine if there is some sort of pre-arranged plan between the real consignee and the hauler whereby the real consignee is really only paying the hauler for the hauling itself. This type of plan can be either express or implied from all the facts. This is the type of subterfuge appellee submits is necessary to be shown from the entire record in order to show something other than private carriage and there is no evidence in the record to raise any question that there are any such agreements either express or implied.

On page 17 of its brief appellant quotes from the Sixty-Seventh Annual Report of the Interstate Commerce Commission which says on page 55 of said report:

> "* * * Sometimes the purchase and sale is a bona fide merchandising venture. In other cases, arrangements are made with the consignee of such merchandise for the 'buy-and-sell' arrangement in order that the consignee may receive transportation at a reduced cost."

The above quotation has reference to a back haul situation; however, appellee only quoted that portion of the report that is material to this discussion. The fact remains that in the case at bar there is nothing either express or implied to indicate that any arrangements have been made with any consignee. Instead appellee deals with its purchasers in sugar and many other items and sells those items at the going market price and takes the various risks incident to merchandising.

In their brief in opposition to appellee's motion to dismiss appeal or to affirm, appellant carrier, in response to the question asked by appellee concerning what more was necessary in order for him to be a bona fide sugar merchant, listed certain things. These included employing commission salesmen or brokers to develop or expand their territory, making large scale purchases of sugar, dealing in futures or engaging in hedging operations, or dealing in beet sugar. In the first place it would not seem necessary for any firm to do any or all of the above suggestions in order to be considered a bona fide merchant of sugar. In the second place appellee does deal through a broker and has a

number of sugar customers. The record also shows that appellee purchases a considerable quantity of sugar, especially in view of the fact that it deteriorates rapidly, has a small margin of profit, and a very flexible market pricewise. In the third place there is no evidence in the record that appellee fails to do any of the above. Certainly even under the substantial evidence rule, when a governmental agency wants to enjoin an individual from operating a phase of its business, it should have the burden of getting into the record the certain things that it believes that the individual does or fails to do which indicates other than private carriage. Nor should there be a presumption that because the record is silent that that should mean that the individual has either done or failed to do something that is consistent with something other than private carriage. The record in the case shows that appellee is in the general mercantile business selling many items including sugar. That he buys the sugar taking title in his own name, is responsible for same, keeps an inventory of same, sells for the going market profit to a number of customers and assumes the risk of large credit transactions to his customers. How he obtained those customers, either by advertising, employing commission salesmen, or some other method is not controlling unless appellant believed that same was in some way material to their case, in which event it should have been developed in the record. If appellee deals in futures or in hedging operations is also beside the point. There is no evidence one way or the other that appellee does so in sugar or in any of the many other products that it handles. If appellant felt that that was material it should have been developed in the record. Concerning appellee making large scale purchases of sugar, accord-

ing to the evidence in the record appellee does so and keeps a reasonable inventory of sugar on hand considering the physical character of the commodity and its price fluxuations. In reply to this appellant goes completely outside the record on page twenty-three of its brief and quotes from a *Cane Sugar Handbook* — actually to be more accurate instead of stating that there was a quote from such handbook, it should be stated that appellant merely summarizes what it considers the handbook to state. Here is a situation where the book would not even have been admissible in the original hearing in this matter, and now appellant seeks to use it for evidence in a review of the record in this case. What happened to appellee's right of cross examination? Who are the authors? Is the supposedly proper equipment available in San Antonio? How much does it cost? Would it affect the storage of other products used and stored by appellee? Would the high humidity of San Antonio have any effect on the efficiency of the machine? Would the cost of operation of the machine price the sugar over the San Antonio market? Why did appellant fail to go into this matter at the hearing by the introduction of proper evidence while appellee was developing the fact that sugar is perishable, has a short profit and a flexible market?

In the *Stickle* case, *supra*, there was a certain charge for hauling depending on where the customers were. There was practically no lumber in Stickle's inventory. In our case there was a considerable sugar inventory, considering the nature of the market in the sugar business, that is, its high perishability and its rapidly changing market price, and there are no definite charges made for hauling in the case at bar. In

fact there are no charges whatsoever made and no deliveries made but the only hauling is the bringing of the sugar from the manufacturer to San Antonio. Appellee's charges do not vary with the delivery charge as in the *Stickle* case, but his price for the sale of sugar varies strictly with the market for sugar. His entire profit comes from the buying and selling of sugar, and it is brought only to San Antonio for sale and the question of transportation rates do not even enter into appellee's charges. If his cost of hauling plus the amount for which he purchases the sugar, plus the loading, unloading, storage, etc. amounts to more than the going sales price in San Antonio, appellee loses money. Also, in the *Stickle* case, the principal payroll of the company was tied up with the paying of truck drivers and the principal assets of the company were invested in transportation facilities. In appellee's case the opposite is true. Less than twenty-five per cent of appellee's salaries are tied up in long-haul truck drivers and these truck drivers representing the less than twenty-five per cent of the salaries paid, do not exclusively haul sugar, but instead haul many other items including livestock, grain, salt, etc. Also the trucks used for hauling sugar are a small percentage of the total assets of the company and again these trucks are far from considered being used exclusively for the hauling of sugar.

Also the court in the *Stickle* case emphasized the fact that normally contracts were entered into to sell and transport the lumber to a certain purchaser before Stickle purchased the lumber from elsewhere. In the case at bar the opposite is true. It is also evident that sugar is a much different commodity from lumber in that it is more perishable, is subject to greater market

fluctuations, and the margin of profit for sugar is smaller. Because of this it is necessary for a sugar merchant to sell his sugar quickly to prevent the possibility of a loss, and for that reason an inventory of sugar would be considered greater, even though it did not have the same value in dollars and cents as an inventory in lumber; since it is not the practice of sugar merchants to keep large supplies of sugar on hand. Sugar must be sold quickly and at a small profit, so that it would naturally behoove appellee to sell his sugar as fast as he could, but even with this added factor, the evidence discloses that appellee does not obtain an order for sugar and then purchase same, but the contrary is true.

In the case at bar appellee has a general mercantile business and sugar is merely one line of the business. This is also different somewhat from the *Stickle* case wherein the only item sold is lumber. Also Stickle had a freight bill with the name and location of the consignee on it; so all Stickle was really doing was delivering, and the consignee had to deliver to the driver a check payable to Stickle for the amount of the transportation charge shown on the freight bill. In the case at bar there is no consignee. There is a purchaser, and there is no item of freight connected with the sales price in any way. Instead a sale is made at the market price on credit. Appellee reiterates that the above statements as to the facts are supported by all the evidence in the record. There is no evidence, much less substantial evidence, to the contrary.

It should be recalled that two of the same three judges decided both the *Stickle* case and the *Clayton*[5] on consecutive days and the facts of the case at bar are much more similar to those of the *Clayton* case where private carriage was found.

One matter to which appellant attaches much importance is the fact that appellee testified that at the present market price of sugar in San Antonio he could not profitably send over an empty truck for sugar and make a profit on the transaction without charging a higher price for the sugar. Such a statement would certainly not be controlling in this matter, even under the substantial evidence rule. The evidence disclosed that because of beet sugar's being brought into San Antonio at the time of the hearing that the market was highly competitive and that appellee could not profitably send an empty truck over to Supreme, Louisiana, to bring back some sugar. Appellee stated that he had profitably done so on other occasions and it would appear that in any general mercantile business it would not be unreasonable for the merchant to attempt to coordinate his transportation in such a manner as to obtain maximum efficiency with the least amount of empty trucks.

Appellant also argues that because at the particular time of the hearing the average profit of appellee was about thirty-five cents per hundred weight and since the transportation charges by common carrier were higher than this figure, that appellee was not

[5] *Interstate Commerce Commission* v. *Clayton*, 127 F. 2d 967, (C.A. 10, 1942) previously discussed on page 17 of this brief.

a private carrier. There is no evidence in the record to show that appellee was underselling anyone else in his sales of sugar in San Antonio. In fact, the evidence shows that he was merely getting the going market price in San Antonio. There is also no evidence in the record that appellee was paying anything other than the regular wholesale price at Supreme, Louisiana, for his purchase of sugar. It would thus appear that, based on the market price in San Antonio, at the time of the hearing, no one could afford to use a common carrier to haul sugar to San Antonio and make a profit. Of course, to settle this question would require much speculation and assumption. There is no evidence in the record as to how the sugar business, both beet and cane, is controlled in this area, and appellee will not speculate as to that. There is also no evidence as to how other sugar merchants in this area transport their sugar to San Antonio; that is, by their own trucks or by using common carriers, and appellee will not speculate as to that. There is evidence in the record that at the time of the hearing beet sugar from other localities was depressing the market and that could possibly explain the profit per hundred weight at the time of the hearing. The point is, however, that appellee submits that the mere fact that the profit for sugar was less at the time of the hearing than the freight rate would not, of itself, or taken together with all the other evidence in the case, under the substantial evidence rule be sufficient to uphold the decision of for-hire carriage. There are many factors going into the cost of a product, including the cost of transportation, handling, loading, unloading, bookkeeping, administrative salaries, etc. Appellee believes, however, that from all the evidence, it is clear that appellee possesses all the incidents of a

bona fide sugar merchant and that his transportation of sugar to his warehouse and office in San Antonio is in furtherance of his primary mercantile business.

Another argument of appellant in the court below was that any reference to appellee's total assets is meaningless in determining the percentage of such assets employed in the sugar phase of the business, since a number of the assets relate solely to appellee's other business activities. Appellee reiterates that there are a number of costs, such as bookkeeping expenses, office equipment, automobiles for account collectors, etc., which necessarily apply to all phases of business alike. For example, even the cottage that is mentioned in the balance sheet was taken in for a bad debt (R. 88). The record does not state whether that was a bad debt for a sugar account, but inasmuch as a substantial portion of the accounts of the business relate to accounts for sugar, there is a good chance that even the cottage could relate to the sugar phase of appellee's business, showing the interrelation between the various phases of appellee's business. Appellee further states that appellant should not persist in attempting to segregate the sugar phase of appellee's business and make that a complete separate entity. The fact is that appellee's sugar business is merely one phase of a general mercantile operation, and the entire business as a whole should be considered in properly deciding this matter.

Appellee would like to say a final word about the freight rates. They would seem to have some weight if it were shown that the freight rate was the same as the profit made on the buying and selling of sugar, for then it would appear that the profit obtained was

merely for transporting the goods; but when there is no relation whatsoever between the profit obtained and the freight rates, but instead the profit merely varies with the market price of the product, it would seem that the freight rate then becomes unimportant. It would seem unusual, to say the least, that appellee could bring salt and molasses in his trucks and because he makes a larger profit on them (if he does), larger than the freight rate, he is a merchant, but because he happens to bring sugar in his trucks and the profit margin may be smaller (if it is), that he then is transformed into a member of the transportation business. In the case at bar appellee is a general merchant handling many products, including sugar. It would certainly seem strange that if he took on a new line on which he could make a profit, larger than the freight rate from the place where he purchased the goods to San Antonio, that he is not a for-hire carrier, but because the market price of sugar was lower (at least at the time of the hearing), that automatically appellee becomes a for-hire carrier. On close analysis this definitely seems to be appellant's and appellant carrier's argument and their principal, if not their only contention, that appellee is a transporter, not a merchant. It would seem to be a factor in determining that appellee was in the transportation business, if, for example, he owned a barber shop which was his primary business and then bought a truck that he used to bring a few types of hair oils to his shop but mainly to bring sugar to San Antonio. Here obviously, his sugar business would necessarily be closely scrutinized, but certainly in the case at bar, there is a distinct difference, where it is shown that appellee has been in business for years, slowly expanding his lines to now include, livestock,

grain, feed stuffs, salt, molasses, and sugar. Clearly appellee is a merchant and nothing else, and the buying and selling of sugar necessarily entails not only transportation costs, but storing costs, collection costs, bookkeeping costs, etc., so that the entire assets of the business must bear its proportionate share of the costs, as in the case in all mercantile businesses where similar, but not the same, items are sold. Appellant makes much of the fact that appellee admitted that he was back-hauling to make money. The statement by appellee (R. 113) is nothing but a statement of common sense. He has sugar as one of his items to buy and sell because he can make money on it. If he could not, it would be foolish for him to continue to buy and sell it. He purchases it in Louisiana and brings it back to San Antonio to sell for the purpose of making a profit. But this does not mean that he thereby becomes a for-hire carrier nor does the "primary business" test require that he lose money on the item to make the particular item come under the doctrine.

Appellant carrier contends that the appellee contributes nothing to the sugar other than its movement from the refinery at Supreme, Louisiana. This statement is not correct. In the first place he stores some of the sugar and contributes that service, as well as the loading and unloading of same. He further takes all the risk of loss or damage and the risk of a declining market. Further he sells the sugar on credit and thereby takes the risk of a loss through bad debts. What other service is a sugar wholesaler supposed to perform?

Appellant and appellant carrier seem to take certain factors, such as the fact that appellee did not use for-hire carriage to transport sugar, or the fact that some of the sugar is delivered direct from the truck to the purchasers and attempt to create the impression that because of this the Interstate Commerce Commission was bound to hold there to be for-hire carriage in the case at bar. However, appellant and appellant carrier take all the indicia of private carriage, such as the fact that appellee purchases the goods in his own name, has no pre-existing orders for same, has only a reasonably small percentage of their assets tied up in transportation facilities, is selling sugar at the going market price in San Antonio and obtaining the going profit therefor, is maintaining a reasonable inventory of sugar on hand, is responsible for any loss or damage to the sugar, is selling sugar on credit and having substantial accounts receivable tied up in sugar, are all and each, even if true, not conclusive to a finding of private carriage. Certain cases are cited holding that any one of those items separately is not conclusive to a finding of private carriage.

The point is, however, that all of those items taken together, even coupled with the fact that appellee does not use for-hire carriage in his transportation of sugar, plus the fact that some of the sugar is unloaded directly from his trucks to the purchasers place of business, plus the further fact that appellee admits that he is in the sugar business and backhauls to make a profit — all of said factors taken together do not, under the law, show substantial evidence for the appellant's requested holding against private carriage in this case. Instead, from

the record as a whole it is evident that there is not substantial evidence to show for-hire carriage.

In the court below appellant contended that appellee's interpretation of the "primary business" doctrine is too broad and that appellee believes that anything that an operator might do to make the overall business less expensive to operate would be in furtherance of such overall business. Appellee does not contend that the "primary business" doctrine goes that far, but merely contends that it goes further than is contended and found by the Interstate Commerce Commission. As is the case in most fields of the law each case must be decided on its own merits and facts, and the "primary business" test must be applied to those particular facts. Appellee submits that in a case such as the case at bar where appellee sells many items that are somewhat related such as grains, feed stuffs, salt and sugar, that such business is a general mercantile business and the transportation to bring the sugar back to appellee's place of business is incidental to the primary mercantile business of selling many items including sugar, just as the transportation of salt in the identical manner has been conceded to be bona fide private carriage in furtherance of appellee's primary business.

Reference is again made to the *Brooks* case, *supra*,[6] when the court on page 524 when considering the history of the Interstate Commerce Act states as follows:

> " * * * In the 'Hearings before the Committee on Interstate Commerce, United States Senate, 74th

[6] *Brooks Transportation Co., Inc., et al.* v. *United States, et al.*, 93 F. Supp. 517, (E. D. Va., 1950), affirmed 340 U. S. 925 previously discussed on pages 13-29 of this brief.

Congress, 1st Session on S. 1629' (Government Printing Office, Washington, 1935), page 86, the late Commissioner Joseph B. Eastman testified as follows in response to questions asked by Senators Hastings and Wheeler (as to whether the proposed bill to regulate motor carriers would regulate the transportation by owners of their own goods being transported to their customers):

"'Well, I was going to say that in instances where the trucker actually buys the products which he transports, if that is a bona fide transaction and not merely a device to evade regulation, he would be a private carrier.'"

So as to clarify some of the statements made by appellant and appellant carrier in their briefs, the record shows that appellee handles many items including corn, oats, wheat, bran, molasses, sugar, fertilizer, and everything in the feed line (R. 106) and also salt. The testimony referred to does not end with "everything *else* in the feed line" which indicates that certain of the items listed are not feeds, so that appellee's business cannot simply be classified as livestock and feed on the one hand and sugar, a completely different commodity, on the other. It is also not clear from the record just how extensively appellee uses common carriers to transport its products. (R. 115-116) The only evidence is that appellee employs common carriers for livestock, grain, and different things. It is also not a proper conclusion to draw from the record that the warehouse of appellee is used primarily to process or store grains, feeds and fertilizers. Although the evidence showed that appellee had in its inventory over fifty thousand pounds of sugar (R. 81), appellant's witness stated that there were only several thousand pounds of feedstuffs stored in the warehouse (R. 75).

The District Court Properly Considered the "Primary Business" Test

Appellee submits that the various factors found by the district court in the case at bar are most important in the application of the "primary business" test to a given fact situation. These include the relationship of non-transportation assets to transportation assets, identifiable transportation charges and a formula to assess same, pre-existing orders, maintenance of an inventory, responsibility for credit and physical risks, and others. The many cases cited by appellant, appellant carrier, amicus curiae, and appellee in tracing the development of the "primary business" test discuss these various factors. Just because the specific name of the test nor the specific statute is not quoted in the court's opinion does not detract from the fact that the test was thoroughly considered and a correct result reached on the fact situation before the court.

The court was presented adequate briefs raising all legal arguments by both sides of the case, but the fact that the court thoroughly considered the "primary business" test and applied it in the case at bar is pointed up by the case of *Church Point Wholesale Beverage Co.* v. *United States*, 200 F. Supp. 508 (W.D. La., 1961). The case is cited by all appellants and an extensive quotation therefrom is found on page thirty-two of the appellant carrier's brief. There the court after a thorough discussion of the "primary business" doctrine found for-hire carriage. The case is different from the case at bar in that most of the goods purchased in the *Church Point* case were to fill pre-existing orders, no inventories were kept, and the marketing area was hundreds of miles beyond the plaintiffs' sell-

ing of their other products. The important point, however, is that Judge John R. Brown from the United States Court of Appeals, Fifth Circuit was one of the three judges in both the *Church Point* case and the case at bar. The citations show that the *Church Point* case was decided first and yet after going into great detail in holding for-hire carriage under the "primary business" test, Judge Brown evidently felt that there was a distinct difference between the fact situation in that case and that of the case at bar, since a different result was reached. And it was reached after a thorough consideration of the various factors important in rendering a decision under the "primary business" test.

Appellee can only speculate as to why the "primary business" test was not mentioned as such in the case at bar by the district court, nor why it was not stated in the opinion, as complained of by appellant on page seven of its brief, that normally the sugar is backhauled. Perhaps the district court felt appellee's position in the case at bar was an unusual one in that he was a bona fide sugar merchant, and should be protected as such, wherein in many situations there is really for-hire carriage under the guise of private carriage — cases of subterfuge where the carriage should be enjoined unless proper authority is granted. Perhaps the district court was careful not to give non-bona fide carriage any case to stretch into its fact situation so as to avoid proper regulation and at the same time to protect appellee who was a bona fide private carrier.

For whatever reason, however, appellee believes that it is clear that the district court reached the right result by following the right test. On page fourteen of

its brief amicus curiae in tracing the history development and meaning of the "primary business" test discusses the *Stickle* case.[7] There the very factors that the district court considered are discussed in determining the application of the test; i. e., the major portion of the payroll went to employees engaged in transportation activities, the lumber was normally purchased to fill pre-existing orders, etc.

There is a Technical Defense Available to Appellee in the Case at Bar

Appellee has never been charged with a violation of Section 203 (c) of the Interstate Commerce Act, but instead, has only been charged with the violation of Section 206 (a) (1) or 209 (a) (1) of said Act.[8] (R. 55, 56), and the investigation was ordered to determine if there were violations of said sections. The Interstate Commerce Commission ultimately found that appellee had violated either one or the other of said sections without specifying which. It should be remembered that since the Congress expressly refused to change the definition of "private carrier" as defined by the Interstate Commerce Act, when the amendment of 1958 previously discussed was enacted into law; and since the Interstate Commerce Act in its definition of "private carrier" includes any person not included in the

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[7] *A. W. Stickle and Co.* v. *Interstate Commerce Commission*, 128 F. 2d 135, (C.A. 10, 1942), certiorari denied, 317 U.S. 650 (1942) previously discussed on pages 18-21 and 34-42 of this brief.

[8] Appellant's brief on pages 36 and 37 set out the pertinent portions of said sections. Section 206 (a) pertaining to the necessity of a common carrier to have a certificate of public convenience and necessity and Section 209 (a) requiring a contract carrier to have a permit.

definition of "common carrier" or "contract carrier",[9] and since Section 203(c) of the Interstate Commerce Act[10] adds the "primary-business" test into the statutory law by prohibiting any for-hire transportation business by motor vehicle in interstate or foreign commerce without a certificate or permit, and by prohibiting any person engaged in any other business enterprise to transport property by motor vehicle in interstate or foreign commerce for business purposes, unless such transportation is within the scope, and in furtherance, of a primary business enterprise other than transportation; it seems that a new classification may have been enacted into the Interstate Commerce Act. In the case at bar appellee is not a "common carrier" since he does not hold himself out to the general public to engage in transportation;[11] nor is he a "contract carrier" since there are no continuing contracts for the furnishing of transportation services.[12] If appellee is operating improperly or illegally; then he is either an improper or unauthorized private carrier, or he is a "for-hire" carrier which is something other than a "common", "contract" or "private" carrier. In either event appellee should have been charged with a violation of Section 203 (c), since that is the primary, if not the only section involved in this matter, and not Sections 206 (a) or 209 (a).

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[9] Section 203 (a) (17) of the Interstate Commerce Act, 49 U.S.C. §303 (a) (17) found in appellant's brief, page 36.

[10] Found in appellant's brief, page 36.

[11] Section 203 (a) (14) of the Interstate Commerce Act, 49 U.S.C. §303 (a) (14) found in appellant's brief, page 35.

[12] Section 203 (a) (15) of the Interstate Commerce Act, 49 U.S.C. §303 (a) (15) found in appellant's brief, page 35.

Of course, another interpretation would be that the addition of Section 203 (c) of the Act made the various carrier definitions too vague, general, uncertain and indefinite for proper administration or the opinion of the Interstate Commerce Commission in the case at bar does not meet the standard of definiteness required for due process under the Administrative Procedure Act.[18] Not only does the amendment of the Interstate Commerce Act on which the decision is based make the Act too indefinite and uncertain, but also the opinion of the Interstate Commerce Commission in making an equivocal finding that appellee has violated either one or the other of two mutually exclusive sections; that is, Section 206 (a) or 209 (a), without stating which, or making basic essential fact findings upon which to determine if either of such sections were violated, makes said opinion too indefinite to be enforced. The various fact findings necessary to show either common or contract carriage should have been made; otherwise appellee should not have been charged with the violation of said sections, and if it were some other section of the Act that appellee has violated then that should have been charged and findings made to support such charge. Of course, the Interstate Commerce Commission did not make the fact findings necessary to show either common or contract carriage since there is absolutely no evidence in the record to show that appellee could fit into the definition of either common or contract carrier. He does not hold himself

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[18] Administrative Procedure Act, Section 8 (b), 60 Stat. 242 (5 U.S.C. Section 1007) found on page 59 of this brief. Also please see *National Labor Relations Board* v. *Express Publishing Company*, 312 U.S. 426 (1941) which sets up the standards of definiteness which must be met by an administrative order.

out to the general public to engage in transportation, nor does he have any continuing contracts to furnish transportation services. It should also be kept in mind that the violation of an order of the Interstate Commerce Commission is a crime under Section 222 (a) of the Interstate Commerce Act,[14] which lends weight to the fact that the equivocal finding is insufficient. Under said equivocal conclusion appellee would have to defend himself against a conclusion that he has committed either one or the other of two mutually exclusive violations. If there were ever a contempt action brought under the cease and desist order as propounded by the Interstate Commerce Commission, the court would be required to perform the supposedly completed administrative function of deciding, for the first time, which, if either, of the two sections has been violated by appellee. Further appellee in order not to be in violation of said order, ought to be able to determine what changes should be made in the manner of conduct of his sugar business to avoid the necessity of applying for either a common carrier certificate or a contract carrier permit. If he is a contract carrier, appellee ought to be able to be one no longer by terminating the "continuing contracts with one person or a limited number of persons" that are essential to the conclusion that he is a contract carrier, and if appellee is a common carrier, he ought to be able to cease the holding of himself out to the public, which is essential to his being such common carrier. Also under the order, if appellee is to continue in his sugar business, he must either obtain a contract carrier permit or a common carrier certificate, but from the order cannot deter-

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[14] Quoted on page 59 of this brief.

mine which. And to reiterate if appellee has violated some other section instead, he should be so charged.

Private Carriage Deserves Protection as Much as Any Other Form

Appellee understands the problems of the appellant carrier in this case. They are regulated and argue to protect any and all of their rights which is as it should be. But they should not be granted additional rights at the sacrifice of the rights of the small businessman. Appellee believes that a man in the general mercantile business should not be prevented from using his own trucks to haul his own products in his own business, nor can he imagine that the Congress would have intended that he or a man similarly situated should be prevented from so doing.

In *Taylor* v. *Interstate Commerce Commission*, 209 F. 2d 353 (C.A. 9, 1953), certiorari denied, 347 U.S. 952,[15] the carrier bought finished lumber wholesale in Oregon and transported it to the yards of Idaho retailers who purchased it f.o.b. their yards and who did not know the carrier's source of the lumber sold nor that the lumber was brought in the carrier's trucks. The carrier purchased lumber at a price low enough to make a profit after he had contracted with his buyer. The court found the carriage to be private. The court in its opinion at page 354 says as follows:

> "The Commission contends a policy of Congress requires us to give a liberal interpretation to the Act in favor of establishing that Taylor is a contract and not a private carrier. 'Liberal' is a

[15] Previously discussed in this brief on page 32.

weasel word in this connection. The policy of the Act declares as follows:

> 'It is hereby declared to be the national transportation policy of the Congress to provide fair and impartial regulation of *all modes* of transportation subject to the provisions of this Act, so administered as to recognize and *preserve the inherent advantages of each;* * * *' (Emphasis supplied.) Transportation Act of 1940, §1, 54 Stat. 899, 48 U.S.C.A. note preceding section 301."[16]

"One of the modes of transportation subject to the Act, as having 'inherent advantages' is that by private carriers of their own property. This is stated in 303 (17) as follows:

> '(17) The term 'private carrier of property by motor vehicle' means any person not included in the terms 'common carrier by motor vehicle' or 'contract carrier by motor vehicle', who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in the furtherance of any commercial enterprise.'

"We think that in interpretating this paragraph and paragraph (15) providing for 'contact carriers' later considered, there is no rule of interpretation more liberal for one than the other."

On page 356 of the opinion the court states:

"Hence Taylor, one of the smaller businessmen Congress has committees to protect * * *."

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[16] The Motor Carrier Act of 1935 contains the same wording. Please see its quotation of page 3 of the brief of appellant carrier.

These words of the court state clearer than can those of appellee his ideas and feelings concerning the policy behind the decision to be made in this case.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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APPENDIX

Section 222 (a) of the Interstate Commerce Act, 49 U.S.C., §322 (a), provides:

> Any person knowingly and wilfully violating any provision of this chapter, or any rule, regulation, requirement, or order thereunder, or any term or condition of any certificate, permit, or license, for which a penalty is not otherwise provided herein, shall, upon conviction thereof, be fined not less than $100.00 nor more than $500.00 for the first offense and not less than $200.00 nor more than $500.00 for any subsequent offense. Each day of such violation shall constitute a separate offense.

Section 8 (b) of the Administrative Procedure Act, 60 Stat. 242 (5 U.S.C. Section 1007 b), provides:

> Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision or subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.